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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO.

CHARLES DEE SCOTT and
DOYLE MONROE CROSS,

Petitioners

VERSUS

UNITED STATES OF AMERICA

Petition for Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

PETITION ON BEHALF OF THE PETITIONERS

The Petitioners, CHARLES DEE SCOTT and DOYLE MONROE CROSS, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, rendered in these proceedings on September 15, 1971.

OPINION BELOW

The opinion of the Court of Appeals as reported in *448 F. 2d 581* appears as Appendix A, *infra*, pp. 8-12. There is no formal opinion of the District Court.

JURISDICTION

The order or judgment of the Court of Appeals was entered on September 15, 1971. A timely petition for rehearing was denied on October 12, 1971. Petitioners were subsequently granted a stay of judgment pending application for writ of certiorari to the Supreme Court of the United States to and including November 11, 1971. The Supreme Court on that date extended the time for filing until December 10, 1971. The jurisdiction of this Court is invoked under 28 USCA Sec. 1254(1).

QUESTIONS PRESENTED

I. WHETHER 18 USCA SEC. 1343 EMBRACES AND COVERS A SCHEME TO DEFRAUD A TELEPHONE COMPANY OF REVENUES FOR INTERSTATE TELEPHONE SERVICE.

II. WHETHER OR NOT COUNSEL FOR THE GOVERNMENT'S ARGUMENT TO THE JURY WAS PLAIN ERROR.

III. WHETHER OR NOT THE COURT WAS REQUIRED TO CHARGE THE JURY ON GOOD FAITH AS A DEFENSE.

STATUTORY PROVISIONS INVOLVED

The statute which appellants SCOTT and CROSS were found guilty of violating, 18 USCA Sec. 1343, reads as follows:

> "Whoever, having devised or intended to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication, in interstate commerce, any writings, signs,

signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

STATEMENT OF FACTS

Your petitioners, SCOTT and CROSS, were convicted after a joint indictment and trial on two counts of violating 18 USCA Sec. 1343. From this conviction they appealed to the United States Court of Appeals for the Fifth Circuit and their appeal was denied. Petitioners now file this petition for writ of certiorari.

The scheme charged was that SCOTT and CROSS tapped on to the telephone company's line in Dalton, Georgia, and made long distance (interstate) calls without having subscribed for telephone service.

REASONS FOR GRANTING THE WRIT

I. WHETHER 18 USCA SEC. 1343 EMBRACES AND COVERS A SCHEME TO DEFRAUD A TELEPHONE COMPANY OF REVENUES FOR INTERSTATE TELEPHONE SERVICE.

18 USCA Sec. 1343, devoid of language not pertinent to this case, provides as follows:

> "Whoever, having devised . . . any scheme to defraud . . ., transmits . . . by means of wire . . . communication in interstate . . . commerce, any . . . sounds for the purpose of executing such schemes . . ., shall be fined . . . or imprisoned . . ., or both."

Thus, three elements appear from the statute which are necessary for there to be a violation:

1. A scheme to defraud;
2. Transmission by means of wire of a communication in interstate commerce; and

3. The communication transmitted by wire must have been made for the purpose of executing the scheme.

The companion mail fraud statute (18 USCA Sec. 1341) which is *in pari materia* and which seems to have the same general purpose is very similar in language to 18 USCA Sec. 1343, in that the same elements necessary for conviction are contained therein.

A close examination of the language of 18 USCA Sec. 1341 shows that the prohibition against the use of wire to further the scheme is a prohibition with respect to the means of instituting and carrying out the scheme and not, as in the present case, a prohibition with respect to depriving the telephone company of revenue for interstate telephone service.

The reported cases annotated under 18 USCA Sec. 1343 indicates that these decisions are in keeping with the intent of Congress in passing this statute.[1] There are three cases[2] which depart from the majority of the cases reported and indicate that depriving the telephone company of revenue for interstate telephone service is a crime within the meaning of this statute. Two of the three cases dealing with this question were United States District Court cases and one was a United States Court of Appeals case. It is respectfully pointed out that in none of these cases was this particular question raised and in only one case *(Brandon v. United States, 382 F.2d 607)* was the question mentioned and even then it appears to be *obiter dicta*. This question has not been before this Court.

As previously pointed out, the mail fraud section is *in pari*

[1] 1952 U.S. Code Cong. and Adm. News, p. 2234;
1956 U.S. Code Cong. and Adm. News, p. 3091.

[2] Brandon Vs. United States, 10 Cir. 1967, 382 F.2d 607;
United States vs. Beckley, N.D.Ga. 1965, 259 F.Supp. 567;
United States vs. Hanna, S.D.Fla. 1966, 260 F.Supp. 430.

materia and construction of the wire fraud section should be along the same lines as the mail fraud section.

In *U. S. vs. Kelem, C.A.Cal., 1969, 416 F.2 346,* the Court of Appeals held that the mail fraud section should be carefully and strictly construed in order to avoid extending its scope beyond the limits intended by Congress. This decision, of course, follows the established rules of construction of statutes.

It necessarily follows that the theft of any of the means of communication should not be covered under either the mail fraud section or the wire fraud section. The action being restricted by these statutes is not the means of communication, but rather the defrauding of a third person in another state by the use of the mail or wire. The prohibition is against the use of a vehicle of communication and not the theft of the vehicle itself.

II. WHETHER OR NOT COUNSEL FOR THE GOVERNMENT'S ARGUMENT TO THE JURY WAS PLAIN ERROR.

In his summation to the jury, counsel for the government gave a false statement to the jury regarding the testimony of the witness, FRANKIE HOOD. The attorney stated that FRANKIE HOOD testified that DOYLE CROSS had called her in an interstate telephone call and said, "You can't call me. I'll call you." (R.App. 324)

This false statement was made at a critical period in the trial of the case of DOYLE CROSS. Counsel for CROSS, at the time, interrupted stating that the witness did not so testify and requested that the same be corrected. Her testimony is on page 140 to 142. The judge stated that the jury was the determiner of the facts.

Testimony revealed that CROSS made a similar statement one other time, (R.App. 324) and this statement might be

made by anyone once, but to state it twice would indeed be indicative of the offense charged.

III. WHETHER OR NOT THE COURT WAS REQUIRED TO CHARGE THE JURY ON GOOD FAITH AS A DEFENSE.

The ground of exception to the failure to so charge was that "It is our contention that good faith would be and would constitute a complete defense to our prosecution under Sec. 1343, just as it does under mail fraud in Sec. 1341". (R. App. 350).

The judge charged on the question of intent and knowledge. No request was made that the court charge on good faith.

All criminal cases, of course, necessitate proof of intent and knowledge; but, in the "scheme and artifice to defraud", statutes (18 USCA Sec. 1341 and 18 USCA Sec. 1343) "good faith" seems to have a uniquely prominent feature as a "defense" although no cases can be found under "good faith", 18 USCA Sec. 1343.

It seems that there is no doubt that Sec. 1343 cases are to be accorded the same "good faith" defenses as Sec. 1341 cases.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

SAM F. LITTLE
ATTORNEY FOR PETITIONER

P. O. Box 611
Dalton, Georgia 30720
(404 278-6201

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1597
Summary Calendar*

CHARLES DEE SCOTT, DOYLE MONROE CROSS,
Appellants,

VERSUS

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of Georgia

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(September 15, 1971)

Before BELL, AINSWORTH, and GODBOLD,
Circuit Judges.

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*Rule 18, 5 Cir., *Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al.*, 5 Cir., 1970, 431 F.2d 409, Part I.

CHARLES SCOTT, DOYLE CROSS v. U.S.A.

BELL, Circuit Judge: Appellants Scott and Cross appeal from their conviction after a joint indictment and trial on two counts of violating 18 USCA § 1343.[1]

The fraud charged was that Scott and Cross made an unauthorized connection with the General Telephone Company's line in Dalton, Georgia, and then made long distance interstate calls without having subscribed for telephone service. The fraud was perfected by giving, for billing purposes, the phone numbers of other persons who did not know appellants and who did not give permission for their numbers to be so used.

Scott argues, among other things, that there was insufficient evidence to support his conviction. The record discloses that the unauthorized phone was located in Scott's home. Telephone company officials testified that Scott had neither made application for the phone in question nor could he have received installation had he applied due to an overdue account in excess of three hundred dollars on a phone at a previous residence. Furthermore the very nature of the installation, i.e., a "drop-line" off of the telephone cable running to a neighbor's residence, indicated that the phone had not been installed according to authorized telephone company procedures. The evidence also discloses that Scott participated in a conversation using the phone in question. Moreover, Scott permitted appellant Cross to use the illegal phone to make

[1] 18 USCA, § 1343:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

interstate calls. Furthermore, when Scott was arrested he made statements to the arresting officers attesting to the ease with which such phone installations could be obtained at a price of fifty dollars. The arresting officer was unsure whether Scott admitted to knowing that the installation was illegal. However Scott did admit that "[he] must have been a damn fool" to tap the line which, he later learned, went to the home of a law enforcement officer.

The evidence against Cross consisted of proof of his use of the phone to make several interstate calls while giving different phone numbers for billing purposes. The calls were charged, at his direction, to persons who testified that they did not know either of the defendants and did not give permission for their numbers to be used. During the course of one of the calls made by Cross, he was heard to tell one of the other parties, "No don't call me. I'll call you . . .," thereby raising the inference that Cross knew that the phone was illegally installed and could be used only for outgoing calls if the secrecy of the illegal installation was to be preserved.

Upon this statement of the facts and evidence, we apply the familiar standard of *Glasser v. United States*[2] which has been long followed in this circuit.[3] Viewing the evidence presented most favorably to the government, we find the evidentiary basis for conviction to be entirely adequate.

It is further contended that it was reversible error for the government to argue to the jury in closing that there was

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[2] "The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the government, to support it." 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680, 704 (1942).

[3] *Gordon v. United States*, 5 Cir. 1971, 438 F.2d 858; *United States v. Piercefield*, 5 Cir. 1971, 437 F.2d 1188; *United States v. Preston*, 5 Cir. 1969, 420 F.2d 60 (1969); *Strauss v. United States*, 5 Cir. 1963, 311 F.2d 926, 928.

evidence that on more than one occasion, appellant Cross told the party with whom he was talking not to try to call Cross back. This argument goes that the evidence was that Cross made this statement only once.

This claimed error falls under the harmless error standard of Rule 52, F.R.Civ.P.,[4] which makes it incumbent on the reviewing court to determine whether the matter complained of "affected substantial rights."

The record reveals that after objection to this portion of the government's argument, the trial judge stated to the jury that it was the jury's role to determine facts and that they were free to check the accuracy of the government's argument. Thereafter the prosecuting attorney stated to the jury that he might have been mistaken as to whether there were one or two occasions when Cross made the statement in question and urged the jurors to use their own judgment if he had unintentionally misstated the evidence.

This court has held that an inadvertent misstatement of fact which is neither pronounced nor persistent and where there is an instruction that the arguments of counsel are not to be treated as evidence, does not affect substantial rights within the meaning of Rule 52. *Rubin v. United States,* 5 Cir. 1969, 414 F.2d 473. Additionally, given any cumulative effect that the prosecutor's misstatement might have had, the matter erroneously referred to by the government was otherwise properly before the jury to the extent of the one occasion, thus reducing any prejudicial impact. See *Buie v. United States,* 5 Cir. 1969, 420 F.2d 1207.

Following these precedents and recognizing the remedial

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[4] Rule 52:

"(a) Harmless Error. Any error, defect irregularity or variance which does not affect substantial rights shall be disregarded."

instructions by the court and the qualifying remarks by the prosecutor, we cannot conclude that the prosecutor's misstatement amounted to reversible error.

There is no merit in the additional claim of error premised on the failure to give an instruction to the jury on the defense of good faith. This request was made after the original charge but before the jury retired. This defense was adequately covered in the charge as given.[5]

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[5]Although the matter was not raised by appellants, this court has given careful consideration to whether 18 USCA § 1343 covers a scheme to defraud the telephone company of revenues for interstate telephone service. That question has been answered in the affirmative. *Brandon v. United States*, 10 Cir. 1967, 382 F.2d 607; *United States v. Beckley*, N.D. Ga. 1965, 259 F.Supp. 567; *United States v. Hanna*, S.D. Fla. 1966, 260 F.Supp. 430, *rev'd on other grounds*, 5 Cir. 1968, 393 F.2d 700. There is no case to the contrary. We agree that the statute embraces the conduct charged here.

AFFIRMED.

CERTIFICATE OF SERVICE

I have served the within petition for writ of certiorari upon the United States of America by mailing a copy of same to Honorable John W. Stokes, Jr., United States Attorney, P. O. Box 912, Atlanta, Georgia 30301.

This 10th day of December, 1971.

SAM F. LITTLE
Attorney for Petitioners.

CERTIFICATE OF SERVICE

I have served the within petition for writ of certiorari upon the Solicitor General of the United States personally at his office in the Judicial Building, Washington, D. C.

This 10th day of December, 1971.

SAM F. LITTLE
Attorney for Petitioners.